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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Should this Court grant certiorari to resolve a conflict between the circuits as to whether Section 2 of the Voting Rights Act, as amended, governs the election of judicial officers?

PARTIES

The following were parties in the courts below:

Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon III, and the Louisiana Voter Registration/Education Crusade, *Plaintiffs*;

The United States of America, *Plaintiff-Intervenor*;

Charles E. Roemer, in his capacity as governor of the State of Louisiana, W. Fox McKeithen, in his capacity as Secretary of the State of Louisiana, and Jerry M. Fowler, in his capacity as Commissioner of Elections of the State of Louisiana, *Defendants*.

Pascal F. Calogero, Jr., and Walter F. Marcus, Jr., *Defendants-Intervenors*.

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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Ronald Chisom, Marie Bookman, Walter Willard, Marc Morial, Henry Dillon III, and the Louisiana Registration/Education Crusade respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on November 2, 1990.

OPINIONS BELOW

The opinion of the Fifth Circuit is not yet reported, and is set out at pp. 1a-3a of the appendix hereto ("App."). The opinion of the United States District Court for the Eastern District of Louisiana is unreported and is set out at pp. 4a-64a of the appendix, except for statistical tables that are an appendix to the district court's opinion. Copies of those tables have been filed under separate cover with the Clerk of the Court.

In addition to the opinions in this case, there is set out at pp. 65a-99a of the appendix hereto the opinion of the majority of the Fifth Circuit sitting *in banc* in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990), which is the basis of the opinion of the Fifth Circuit in this case.

This case was the basis of two earlier appeals; the previous reported decisions, in chronological order, are as follows:

Chisom v. Edwards, 659 F. Supp. 183 (E.D. La. 1987);

Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, 488 U.S. __, 102 L.Ed.2d 379 (1988);

Chisom v. Edwards, 690 F. Supp. 1524 (E.D. La. 1988);

Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988).

JURISDICTION

The decision of the Fifth Circuit was entered on November 2, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973, which provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by a State of political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .

(b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

The Proceedings Below.

This case was brought by African American citizens of the United States in 1986 under Section 2 of the Voting Rights Act, as amended, 42 U.S.C. § 1973 and the fourteenth and fifteenth amendments to the Constitution of the United States.[1] The plaintiffs, who are voters, attorneys,

[1]The issue in the case as it reaches this Court involves only the claims of the petitioners under the Voting Rights Act.

and a voter registration and education organization, challenged the multi-member aspect of the scheme of election of justices of the Supreme Court of Louisiana by districts on the ground it denied African Americans an equal opportunity to participate in the political process.

The district court initially granted the defendants' motion to dismiss on the ground that Section 2 of the Voting Rights Act did not govern the election of judges; this ruling was reversed by the Fifth Circuit and this Court denied certiorari. *Chisom v. Edwards*, 659 F. Supp 183 (E.D. La. 1987), *reversed*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, 488 U.S. __, 102 L.Ed.2d 379 (1988).[2]

After a trial on the merits, the district court held that the plaintiffs had not established that the method of electing supreme court justices violated either the Voting Rights Act

[2]On remand, the district court granted a preliminary injunction enjoining the state from going forward with an election under the challenged system, *Chisom v. Edwards*, 690 F.Supp 1524 (E.D. La. 1988), but this decision was also reversed, by a different panel of the Fifth Circuit. *Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988).

or the Constitution. (App. pp. 4a-64a.) Petitioners appealed limited to the question of whether a violation of the Voting Rights Act had been shown. On November 2, 1990, a panel of the Fifth Circuit ruled that the Voting Rights Act does not apply to judicial elections based on the September 29, 1990, *in banc* Fifth Circuit in *LULAC v. Clements*, 914 F.2d 620 (App. pp. 65a-99a).[3]. The "cardinal reason" for the result in *LULAC* was that the Voting Rights Act did not apply to judicial elections because "judges need not be elected at all." 914 F.2d at 622. App. p. 66a.[4] Judges Higginbotham and Johnson, who were on the panel in the

[3]In *LULAC*, after oral argument before a panel of the Fifth Circuit, the full court, *sua sponte*, set down the case for rehearing *in banc* to decide the issue of whether the Voting Rights Act applies to judicial elections. By a 7-6 majority the Fifth Circuit overruled its prior decision in *Chisom* and held that the results test of Section 2, did not apply to the election of judges. *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990)(App. pp. 65a-99a)

[4]A petition for writ of certiorari will be filed in *LULAC v. Clements* shortly. For the reasons set out in that petition, petitioners here urge that review be granted in both cases.

present case, dissented from that holding of *LULAC*[5] but were constrained to rule in *Chisom* that judicial elections were not covered at all by Section 2 of the Voting Rights Act and that, therefore, the complaint must be dismissed.[6] (App. pp. 2a-3a.) This petition followed.

Statement of Facts.

In Louisiana, all but one of the six districts from which members of the Supreme Court are elected are geographically defined single member districts and elect one justice each. The lone multimember district, the First Supreme Court District ("the First District") elects two

[5]Judge Higginbotham, joined by three other judges, dissented from the holding that Section 2 covered *no* judicial elections, but concurred in the result in *LULAC* on other grounds. 914 F.2d at 636. Judge Johnson, who was the author of the original opinion in the present case, dissented in *LULAC*. 914 F.2d at 657. Chief Judge Clark also concurred in the result in *LULAC* but not with its holding that no judicial elections were covered. 914 F.2d at 633.

[6]As a result of the decision in *LULAC*, the panel in the present case did not reach or decide the issue of the correctness of the decision of the district court on the merits of plaintiffs' claims. If this Court grants certiorari and reverses the decision below, the appropriate disposition would be a remand to the court of appeals for a decision on the merits.

justices.[7] App. 7a-8a. With a population of over 1,100,000 and spanning four parishes -- Orleans, St. Bernard, Plaquemines, and Jefferson -- it is by far the largest supreme court district, is more than twice the size of the smallest supreme court district,[8] and has by far the largest African American population. The First District is 34.4% African American in total population and African Americans comprise 31.61% of the registered voters. App. 10a. Orleans Parish contains more than half of the population of the First District and is majority African American in both total population (55.3%) and in the percentage of registered voters (51.6%). As of March 3, 1988, 81.2% of African American registered voters within the First District resided within Orleans Parish. The other three parishes that make

[7]The two justices have staggered terms, so that they are chosen in different elections. Therefore, African American voters are unable to optimize their political influence by single-shot voting.

[8]The Louisiana constitution does not require that the election districts for the Supreme court be apportioned equally by population. Indeed, the total population deviation between districts is 74.95%, with the 1980 population of the Fourth District being 411,000. App. 10a.

up the First District are overwhelmingly white. App. 9a, 13a.

The result of combining the four parishes into one district from which the entire population elects two supreme court justices is that white voters are in a substantial majority, comprising 65.21% of the total population and 69.49% of the voting age population. App. 10a. The First District could easily be split into two roughly equal supreme court districts: one, comprised of Orleans Parish, predominantly African American with a population of 557,515, and the other, comprised of the three remaining parishes, predominantly white with a population of 544,738.[9] App. 10a.

Judicial elections in Louisiana are extremely racially polarized. Whites vote for white candidates and when given a choice, African Americans overwhelmingly support

[9]These two districts would fall well within the range of population of existing supreme court districts; for example, the Second and Sixth Districts have populations of 582,223 and 556,383, respectively. App. 10a.

African American candidates. White voters consistently fail to support African American judicial candidates. This political climate exists against an historical backdrop of pervasive disenfranchisement on the basis of race.[10] In addition, the African American community continues to suffer a legacy of discrimination that translates into depressed socio-economic conditions today.

No African American has been elected to the Louisiana Supreme Court from the First District or any other supreme court district in modern times.[11] Although African Americans comprise 29% of the state's population, few African Americans have been elected to other offices within the First District outside of Orleans Parish. The

[10]*United States v. Classic*, 313 U.S. 299 (1941); *Louisiana v. United States*, 380 U.S. 145 (1965); *Anderson v. Martin*, 375 U.S. 399 (1964). *See also*, *Sobol v. Perez*, 289 F. Supp. 392 (E.D. La. 1968) for a vivid account of discriminatory practices in Plaquemines Parish.

[11]The only African American to serve on the Louisiana Supreme Court in this century was appointed to a vacancy on the court for a period of 17 days during November, 1979. Under the Louisiana Constitution, he was not permitted to seek election to the seat for which he had been appointed. *See* La. Const. art. V, § 22(b).

combination of demographic, historical, and socio-economic factors results in African American voters in the First District being denied equal opportunity to participate in the political processes leading to the nomination and election of justices to the supreme court and therefore to elect candidates of their choice.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT ISSUE OF THE MEANING OF THE VOTING RIGHTS ACT ON WHICH THERE IS A CONFLICT BETWEEN THE CIRCUITS

A. The Question of Whether Section 2 Governs Judicial Elections is of National Importance.

Cases challenging the election of judges under Section 2 of the Voting Rights Act have been brought in Ohio,[12] Louisiana,[13] Texas,[14] Florida,[15] Alabama,[16] Georgia,[17]

[12]*Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988)(challenge to the countywide election of municipal judges in Cincinatti).

[13]*Chisom v. Roemer*, *supra*; *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988)(challenge to at-large election of family court, district court, and court of appeals judges).

[14]*LULAC v. Mattox*, *supra*; *Rangel v. Mattox* (5th Cir. No. 89-6226)(challenge to the multi-county election of judges for the Thirteenth Court of Appeals).

[15]*Nipper v. Martinez*, No. 90-447-Civ-J-16 (M.D. Fla. 1990)(challenge to the at-large election of trial judges in the Fourth Judicial Circuit).

[16]*SCLC v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989)(challenge to the numbered post, at-large method of electing circuit and district court judges).

[17]*Brooks v. State Board of Elections*, Civ. No. 288-146 (S.D. Ga. 1989)(challenge to at-large method of electing superior court judges under both Sections 2 and 5 of the Act; summary affirmance by this Court on Section 5 issues, 59 U.S.L. Week 3293 (October 15, 1990), trial pending on Section 2 claims).

Arkansas,[18] Illinois,[19] Mississippi,[20] and North Carolina.[21] Before the Fifth Circuit's decisions in this case and *LULAC*, in all of these cases courts had held that Section 2 governed the elections of both trial and appellate court judges. However, the effect of the decisions in *Chisom* and *LULAC* have already been felt outside of the Fifth Circuit; thus in *SCLC v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989), the district judge recently ordered the parties to file briefs on the defendants' motion for reconsideration in light of *LULAC*.

[18]*Hunt v. Arkansas*, No. PB-C-89-406 (E.D. Ark. 1989)(challenge to the method of electing circuit, chancery, and juvenile court judges in certain counties).

[19]*Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988)(challenge to the at-large method of electing Supreme Court, Appellate, and Circuit Court judges from Cook County).

[20]*Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987)(challenge to the at-large election of judges to state chancery and circuit judges in three counties; district court found liability under Section 2, single-member district remedy established resulting in the election of African American judges).

[21]*Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C.)(challenge to the statewide election of state superior court judges; under settlement, ten African American candidates elected as superior court judges).

The opportunity for confusion caused by the decisions below, and the consequent prejudice to voters' and candidates' rights in jurisdictions where judicial election cases are pending, would in itself warrant this Court's review of this case. Review is made more all the more imperative in light of this Court's recent affirmance of the holding in *Brooks v. State Board of Elections* that Section 5 of the Act covers judicial elections. 59 U.S.L. Week 3293 (October 15, 1990). *Brooks* reiterated this Court's earlier affirmance of the holding in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) that Section 5 governs judicial elections since "the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote." 618 F. Supp. at 413 (emphasis in original).

As Judge Higginbotham noted in objecting to the *LULAC* majority's view that Section 2 does not apply to judicial elections (concurring opinion):

> To distinguish the Sections [2 and 5] would lead to the incongruous result that if a jurisdiction had a discriminatory voting procedure in place with respect to judicial elections it could not be challenged, but if a state sought to introduce that very procedure as a change from existing procedures, it would be subject to Section 5 preclearance and could not be implemented.

914 F.2d at 649. Nevertheless, the *LULAC* majority, since it had to concede that Section 5 covered the election of judges (App. 93a), reached precisely this "incongruous result," one clearly at odds with this Court's directive that the Act be given its "broadest possible scope." *Allen v. State Board of Elections*, 393 U.S. U.S. 544 (1969). *Accord*, *Thornburg v. Gingles*, 478 U.S. 30 (1986).[22] Certiorari should be granted to resolve the confusion created by the Fifth Circuit's decision of the important issue presented by

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[22] Section 2(a) prohibits all States and political subdivisions from imposing *any* voting qualifications or prerequisites to voting or any standards, practices or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class . . . .

478 U.S. at 43 (emphasis in the original).

this case, an issue on which this Court has not yet spoken.

B. The Decision of the Fifth Circuit Is in Square Conflict with the Decision of the Sixth Circuit in Mallory v. Eyrich.

In its first decision in the present case, *Chisom v. Edwards*, 839 F.2d 1056, *cert. denied*, 488 U.S. ___, 102 L.Ed.2d 379 (1988), holding that Section 2 covers judicial elections, the Fifth Circuit relied on substantially the same reasoning as did the Sixth Circuit in *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988). In overruling *Chisom* the Fifth Circuit has placed itself directly in conflict with *Mallory*. *Compare*, *e.g.*, the discussion of Sections 2 and 5 in *Mallory*, 839 F.2d at 280 and *Chisom*, 839 F.2d at 1063-64, *with* that in *LULAC*, App. 93a.

In *Mallory*, a challenge to the election of Ohio municipal court judges, the Sixth Circuit concluded that Section 2 applies to the election of judges based on a thorough review of the plain language of the statute and the

policy behind it,[23] relevant legislative history, and judicial interpretation of Section 5.[24] In its decision, the Sixth Circuit unequivocally rejected the reasoning now adopted by the Fifth Circuit in two critical respects.

First, the Sixth Circuit concluded that there is "no basis in the language or legislative history of the 1982 amendment to support a holding" that when it used the word "representative" in the 1982 amendment, Congress intentionally engrafted an exception onto Section 2 that removed judicial elections from the protective measures of

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[23]By its express terms, the original Voting Rights Act of 1965, which enacted a blanket prohibition against race-based discrimination in voting, applied to judicial elections. "Vote" or "voting" was defined in the Act as including "all actions necessary to make a vote effective in any primary, special or general election, . . . with respect to candidates for public or party office. . . ." §14(b)(42 U.S.C. § 1973*l*(c)(1)). Judicial candidates clearly were "candidates for public or party offices" within the terms of the Act. When Section 2 was amended in 1982, Congress did not change a single word in either Section 14(b) or the operative provisions of the statute that defined its scope. It merely *added*, in Section 2(b), a clear standard of proof for the violations outlined in the old Section 2, which now had become Section 2(a).

[24]As *Mallory* notes, "Section 5 uses language nearly identical to that of section 2 in defining prohibited practices -- 'any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.'" 839 F.2d at 280.

the Act. 839 F.2d at 280. *Compare LULAC*, App. 75a-91a. *Second*, the Sixth Circuit held that challenges to racially discriminatory election mechanisms under Section 2 are not controlled by the rule that the fourteenth amendment's equal population principle apparently does not apply to judicial election districts. 839 F.2d at 277-78 (citing *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973). *Compare LULAC*, App.80a-88a.

The conflict between the Fifth and Sixth Circuit's interpretation of the scope and meaning of Section 2 of the Voting Rights Act should be resolved by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the decision of the court below reversed, and the case remanded for a decision on the merits of petitioners' claims under the Voting Rights Act.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3654

RONALD CHISOM, et al.,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellant,

v.

CHARLES E. "BUDDY" ROEMER, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(November 2, 1990)

Before KING and HIGGINBOTHAM, Circuit Judges.*

PER CURIAM:

The plaintiffs in this action originally claimed that defendants violated the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting

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* This decision is being made by a quorum. see 28 U.S.C. § 46(d).

Rights Act of 1965, § 2, codified as amended, 42 U.S.C. § 1973 (Voting Rights Act). The district court ruled against the plaintiffs on the constitutional claims and the Voting Rights Act claims. The district court's ruling on the constitutional claims was not appealed. Thus, there remains pending before this court an appeal of the district court's disposition of the Voting Rights Act claims.

In view of the fact that this court, sitting en banc in Lulac v. Clements, 914 F.2d 620 (5th Cir. 1990), has overruled Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) (Chisom I), this case is remanded to the district court with instructions to dismiss all claims under the Voting Rights Act for failure to state a claim upon which relief may be granted. See Falcon v. General Telephone Co., 815 F.2d 317, 319-20 (5th Cir. 1987) ("[O]nce an appellate court has decided an issue in a particular case both the District Court and Court of Appeals should be bound by that decision in any subsequent proceeding in the same case.... unless..

controlling authority has since made a contrary decision of law applicable to the issue.") (citations omitted); White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967). Each party shall bear its own costs.

REMANDED with instructions. The mandate shall issue forthwith.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONALD CHISOM, ET AL.	CIVIL ACTION
VERSUS	NO. 86-4057
CHARLES E. ROEMER, ET AL.	SECTION "A"

OPINION
[Filed September 13, 1989]

SCHWARTZ, J.

This matter came before the Court for nonjury trial. Having considered the evidence, the parties' memoranda and the applicable law, the Court rules as follows. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are so adopted.

Findings of Fact

This is a voting discrimination case. Plaintiffs have brought this suit on behalf of all black registered voters in Orleans Parish, approximately 135,000 people, alleging the

present system of electing the two Louisiana Supreme Court Justices from the New Orleans area improperly dilutes the voting strength of black Orleans Parish voters. Specifically, plaintiffs challenge the election of two Supreme Court Justices from a single district consisting of Orleans, Jefferson, St. Bernard and Plaquemines Parishes. Plaintiffs seek declaratory and injunctive relief under section 2 of the Voting Rights Act, as amended, 42 U.S.C. §1973 (West Supp. 1989)[1], and under the Civil Rights Act, 42 U.S.C.

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[1] Section 2 provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . .
>
> (b) A violation of subsection (a) of this section is established if, based upon the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

§1983 (West 1981)[2], for alleged violations of rights secured by the fourteenth[3] and fifteenth[4] amendments of the federal Constitution.[5]

---

[2] Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

[3] The fourteenth amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[4] The fifteenth amendment provides in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

[5] Declaratory relief is also sought under 28 U.S.C. §§2201 and 2202, which provide in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights or other legal relation of any interested party seeking such declaration, whether or not further relief is or could be sought.

I.The present Supreme Court Districts and the black voting population; Minority or majority?

The Louisiana Supreme Court, the highest Court in the state, presently consists of seven Justices, elected from six Supreme Court Districts. Each Justice serves a term of ten years. Candidates for the Louisiana Supreme Court must have been a resident of that election district for at lease two (2) years, and each member of the Supreme Court must be a resident of the election district from which he or she was elected.[6] The State imposes a majority-vote requirement for election to the Supreme Court. Since 1976, every candidate runs in a single preferential primary, but each candidate's political party affiliation is indicated on the ballot. If no single candidate receives a majority of votes in the preferential primary, the top two candidates with the most votes in the primary compete in a general election. Five of the districts elect one Justice each, but one district -- the

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[6] See Pre-Trial Order Stipulation 19 at p.28.

First Supreme Court District -- elects two Justices.[7] These two positions are elected in staggered terms. No Justice is elected on a state-wide basis, although the Supreme Court sits en banc and its jurisdiction extends state-wide.[8] One of the seats in question is presently held by Justice Pascal F. Calogero, Jr.; the other is presently held by Justice Walter F. Marcus, Jr. Judges are not subject to recall elections.[9]

The five single member election districts consist of eleven to fifteen parishes; the First Supreme Court District, as stated above, consists of four parishes. No parish lines are cut by the election districts for the Supreme Court.[10] The Louisiana Constitution does not require that the election districts for the Supreme Court be apportioned equally by

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[7] See Pre-Trial Order Stipulation 18, 21 at pp.28-29.

[8] See Pre-Trial Order Stipulations 3-6, p.24. See also La. Const. of 1974, art. 5, §§ 3, 4 & 22A; LSA-RS § 13:101 (West 1983).

[9] See Pre-Trial Order Stipulation 23 at p.29.

[10] See id. nos. 9-10 at p.26.

population.[11] However, the Louisiana Constitution does authorize the state legislature, by a two-thirds vote of the elected members of each house of the legislature, to revise the districts used to elect the Supreme Court and to divide the first district into two single-member districts.[12]

The New Orleans metropolitan area is composed of Orleans Parish, which has a majority black electorate, and several suburban parishes which have majority white electorates. As of March 3, 1988, 81.2 percent of the black registered voters within the First Supreme Court District resided within Orleans Parish and 16.0 percent resided in Jefferson Parish. Only 2.1 percent of the black registered voters in the First District resided in Plaquemines and St. Bernard Parishes.

The following two tables set forth specific population data from the 1980 census:

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[11] See id. no. 12 at p.26.

[12] See id. no. 24 at p.29.

(1) For the six Supreme Court election districts:[13]

Dist-rict#	Total population	Black population(%)	Total VAP[14]	Black VAP(%)
1	1,102,253	379,101(34.39)	772,772	235,797(30.51)
2	582,223	188,490(32.37)	403,575	118,882(29.46)
3	692,974	150,036(21.65)	473,855	92,232(19.46)
4	410,850	134,534(32.75)	280,656	81,361(29.99)
5	861,217	256,523(29.79)	587,428	160,711(27.36)
6	556,383	129,557(23.29)	361,510	78,660(21.76)
TOT.	4,205,900			

(2) For the parishes in the First Supreme Court District:[15]

Parish	Total popula-tion	Black popula-tion	Total VAP	Black VAP(%)
Jefferson	454,592	63,001(13.86)	314,334	37,145(11.82)
Orleans	557,515	308,149(55.27)	397,183	193,886(48.81)
Plaque-mines	26,049	5,540(21.27)	16,903	3,258(19.27)
St. Bernard	64,097	2,411(3.76)	44,352	1,508(3.40)

As of March 3, 1989, registered voter data compiled by the

[13] See id. no. 13 at p.26.

[14] Voting Age Population

[15] See Pre-Trial Order Stipulation 15 at p.27.

Louisiana Commissioner of Elections indicated the following population characteristics:

(3) For the six Supreme Court election districts:

District #	Total registered voters	Black registered voters(%)
1	492,691	156,714 (31.8%)
2	285,469	76,391 (26.8%)
3	379,951	74,667 (19.7%)
4	208,568	59,140 (28.4%)
5	464,699	119,239 (25.7%)
6	305,699	70,178 (23.0%)

(4) For the parishes in the First Supreme Court District:[16]

Parish	Total registered voters	Black registered voters(%)
Jefferson	202,054	25,064 (12.4%)
Orleans	237,278	127,296 (53.6%)
Plaquemines	14,574	2,796 (19.2%)
St. Bernard	38,785	1,558 (4.0%)
TOTAL	492,691	156,714 (31.8%)

According to the 1980 Census, the current configuration

[16] See id. no. 16 at p.28.

of election districts has the following percent deviations[17] from the "ideal district"[18] with a population of 600,843:[19]

District #	Total Population	Percent Deviation
1	1,102,253	[-16.54%][20]
2	582,223	- 3.10%
3	692,974	+15.33%
4	410,850	-31.62%
5	861,217	+43.33%
6	556,383	- 7.40%

[17] The percentage deviations appear to have been calculated as follows:

$$\%\text{deviation} = \frac{\text{(actual district pop.- ideal district pop.)}}{\text{(ideal district population)}} \times 100$$

[18] In its review of the memoranda, testimony and exhibits, the Court was unable to locate any definition of the "ideal district" apart from reference to population. See Weber Report, Defendants' Exhibit 2, p.48. The Court therefore accepts the parties' stipulation as to the "ideal district" with the understanding that other factors of legal significance may suggest such a district is less than "ideal".

[19] The "ideal district" population of 600,843 is calculated by taking the total population of all districts (4,205,900) and dividing by seven, the number of ideal districts.

[20] The parties stipulated that District 1 shows a -8.27% deviation from the "ideal district." See Pre-Trial Order Stipulation 14, p.27. However, the definition of the ideal district is to take the state population and divide it by the number of districts. The First District elects two justices, therefore, in a comparison of the First District with the "ideal district," the First District's deviation should be multiplied by two, since it elects two justices in what would otherwise be an "ideal" seven district system.

The relative numbers and population densities of black persons registered to vote in each parish are also shown in the parties' stipulations that on December 31, 1988, black persons constituted a majority of those persons registered to vote in 226 out of an unspecified number of voting precincts in Orleans Parish,[21] whereas in Jefferson Parish black persons constituted a majority of those persons registered to vote in only 24 precincts. There are no census tracts in St. Bernard Parish with a majority black population and there is only one such census tract in Plaquemines Parish.[22]

With population size as the only stipulated indicia of an "ideal district", the Court further finds that a district consisting of just Orleans Parish would demonstrate an approximate -7.2% deviation from the ideal district, and a

[21] See United States' Exhibit 47. The March 3, 1989 voter registration data does not alter the number and/or identity of the majority black precincts. See United States' Exhibit 5.

[22] See United States' Exhibit 48. The March 3, 1989 voter registration data does not alter the number and/or identity of the majority black precincts. See United States' Exhibit 6.

district of Jefferson, Plaquemines and St. Bernard Parishes would demonstrate an approximate -9.3% deviation from the ideal district.[23] By contrast, a district consisting of Orleans and St. Bernard Parishes together would present a deviation of only 3.4% and a district consisting of Plaquemines and Jefferson Parishes would show a deviation of -20% from the ideal district.

The defendants argue that a fairly drawn district could consist of Plaquemines, St. Bernard and Orleans Parishes, with a deviation of only 1.1% from the ideal district.[24] Such a district is also geographically compact, but would have a black voter registration of only 45.3%. Moreover, a district thus drawn would isolate Jefferson Parish as a district, with a deviation of -24.3% from the ideal, unless of course further redistricting is done affecting parishes and voting

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[23] The Court's calculations of percentage deviations based on stipulated data yielded the same figures as set forth in Weber's Report, Table 11, p.50.

[24] See Weber Report, p.53.

districts not presently under consideration or before this Court.[25]

Thus, if two districts were drawn without crossing parish boundaries (as is the case in the rest of the state) and if the "ideal district" were based upon population alone, no single member district may fairly be drawn in which blacks would constitute a majority of the voting age population and registered voters. Either Jefferson Parish or Orleans Parish would have to be isolated in such a districting scheme, leaving a second district with an atypically low voter population. Moreover, to date, no parish is isolated as a single district in this state. The Court does not find any of the suggested divisions of the First District to be a particularly "ideal" result.[26] It appears the only way to

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[25] Any such redistricting would best be done by the state legislature, which may revise the Supreme Court districts by a 2/3 vote of each house. See Pre-Trial Order Stipulation 11, p.26.

[26] This should not be construed as a determination at this time by the Court that if a remedy were required the Court must adhere to parish boundaries in creating new districts.

provide a sizable single member district in which blacks would constitute a voting age majority would be to create a gerrymandering district lacking geographical compactness.

II. Political Cohesion and Racially Polarized Voting

A wide range of evidence was made available to the Court for the purpose of evaluating whether plaintiffs' minority is so politically cohesive that the districting here in question thwarts distinct minority interests. Such evidence is also relevant to the related question of whether racial bloc voting has occurred within the First Supreme Court District.

Evidence relevant to these issues includes data pertaining to judicial and nonjudicial elections to be evaluated against the overall political background in the New Orleans area.

The Court will first offer some preliminary findings bearing generally upon the scope of evidence to be considered and upon the use of statistical data. The Court will next discuss the historical background of minority

discrimination leading to the present claims. A detailed analysis of facts pertinent to both the issues of political cohesion and racial bloc voting will follow.

The Court finds that judicial elections are sufficiently different from elections for legislative and administrative offices to warrant caution in making inferences about voter behavior using the techniques employed to analyze voter polarization and vote dilution in those other types of elections.[27] In particular, judicial elections as contrasted to those other elections are characterized by lower turnout, higher roll-off rates, and by less voter interest. For example, analyses of the level of competition for judicial offices compared to state legislative offices within the four parish area of the First Supreme Court District during the past decade indicate that almost 64 percent of judicial races have been uncontested, whereas only about 30 percent of

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[27] See generally Weber Report, Defendants' Exhibit 2, pp.2-10. While relying upon Dr. Weber's report, the Court finds much of the matter here discussed is general knowledge of which the Court might properly take judicial notice.

state senate and house of representatives elections have gone uncontested. The number of candidates for judicial offices is particularly low in the election years when the terms of incumbent judicial officers expired. However, the Court has also considered the testimony, statistical evidence, and expert reports pertaining to other elections, and the Court generally finds that such evidence is consistent with the import of data from judicial elections, even though the Court is inclined to give evidence relating to judicial elections greater weight.

In analyzing statistical data, the Court finds that the best available data for estimating the voting behavior of various groups in the electorate would come from exit polls conducted upon a random sample of voters surveyed as they leave the polling place on election day, but such evidence is not available. The best available data for estimating the participation of various groups in the electorate is sign-in data contained in the official records of the Parish Registrar of Voters. The best indicator of participation is obtained by

dividing the number of persons who signed-in to vote by the number of persons in the voting age population.

In the absence of exit poll, sign-in, and voting age population data, analysts employ the bivariate ecological regression technique[28] to estimate the voting behavior of various groups in the electorate. Because this analysis produces only an estimate of voting behavior, the Court finds it should consider, but is not necessarily in a position to consider, what factors are present in the analysis, such as: the number of cases; variations of the independent and dependent variables; the timing of electoral data as compared to the sign-in, voter registration, or the voting age population data; and comparability of the geographical units (usually precincts) used in the analysis. From the record before it,

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[28] "Regression analysis is a statistical technique that can be used to develop a mathematical equation showing how variables are related." D. Anderson, D. Sweeney and T. Williams, Statistics for Business and Economics, 406 (2d Ed. 1981). The variable being predicted by the mathematical equation (in this case, the percentage of the vote won by each candidate) is the dependent variable. The variables used to predict the value of the dependent variable are the independent variables. In this case, the independent variables are the percentages of voters who are black or white. See Weber Report, Defendants' Exhibit 2, pp.10-11.

the Court is definitely not in a position to assess other important aspects of statistical analyses, such as use of proper procedures to verify the accuracy of the data, and proper functioning of a statistical analysis computer program. A further challenge is to avoid becoming entrenched in a "numbers game" that obscures the forest for the trees. The parties have often times been of scant assistance by offering numerical data (such as the total percentage deviations from ideal districting) lacking in readily apparent meaning. It thus appears that precise correlation between the race of voters and their voting preferences cannot be made on the basis of the statistical analyses presented. However, no better data is provided, and the Court has given the statistical data considerable weight.[29]

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[29] This Court has additional reservations regarding use of much of the statistical analyses here presented, which reservations are expressed in the Court's opinion on plaintiffs' motion for preliminary injunction. See Chisom v. Edwards, 690 F.Supp. 1524, 1528 & n.25 (E.D.La.), vacated 850 F.2d 1051, reh'g denied, 857 F.2d 1473 (5th Cir. 1988).

In any event, whether testimony, stipulated data, or statistical analysis is cited, the Court's evaluation of the presence of political cohesion and racially polarized voting includes consideration of the race of the voters, the race of the candidates, and the access the minority has had to the political process.

A. Access to the Political Process -- Effect of Past Discrimination[30]

The Court's analysis of the presence of racial bloc voting and political cohesion must be made against a background evaluation of the extent to which political opportunities are presently hampered by vestiges of past discrimination.[31] The Court's historical findings are based

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[30] Monroe v. City of Woodville, No. 88-4433, slip op. (5th Cir. Aug.30, 1989), suggests that the Court need not reach the Thornburg totality of the circumstances inquiry, if it finds that the plaintiffs fail to establish all three elements of the initial 3-part test in Thornburg. This Court nonetheless makes the following findings, in part to provide a full record of findings and in part because the inquiry into these elements overlaps to some extent the inquiry into political cohesion and bloc voting.

[31] See Thornburg v. Gingles, 478 U.S.30, 106 S.Ct. 2752, 2776, 92 L.Ed.2d 25 (1986).

primarily upon stipulated facts, with reference to live testimony where indicated.

1. Voting

Louisiana has had a past history of official discrimination bearing upon the right to vote. In this regard, the parties stipulated[32] to most facts found by the three judge panel in Major v. Treen,[33] including the imposition in 1898 of property and educational qualifications on the franchise, and the enactment of a "grandfather" clause[34] to allow whites, but not similarly situated blacks, to vote even when they did otherwise qualify. In 1923, Louisiana authorized white only primaries, which continued until their invalidation

[32] See Pre-Trial Order Stipulations 36-38, p.38.

[33] 574 F.Supp. 325 (E.D.La. 1983).

[34] In Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), the Supreme Court ruled that "grandfather" clauses violated the Fifteenth Amendment. The state then amended its constitution to replace the "grandfather" clause with a requirement that an applicant "give a reasonable interpretation" of any section of the federal or state constitution as a prerequisite to voter registration. In Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965), the Supreme Court held the "interpretation" test to be another aspect of illegal disenfranchisement.

in 1944.[35] In the 1950s, Louisiana instituted "citizenship" tests and anti-single-shot voting laws.[36] In 1959, the State Democratic Party adopted a majority vote requirement for election of party officers.[37]

The State of Louisiana is also subject to special provisions of the Voting Rights Act because in 1965 it employed a "test or device," as defined in the Act, as a prerequisite to register to vote. Less than fifty percent of the voting age population (at that time 21 years of age or older) voted in the 1964 presidential election. Moreover, since the enactment of the 1965 Voting Rights Act, federal examiners have been appointed to enforce the Act's provisions in twelve Louisiana parishes including, from the

[35] See Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 1052, 88 L.Ed. 1594 (1944).

[36] For a description of single-shot bullet voting, see Thornburg v. Gingles, 478 U.S. at 38, n.5, 106 S.Ct. at 2760, n.5; City of Rome v. United States, 446 U.S. 156, 184 n.19, 100 S.Ct. 1548, 1565 n.19, 64 L.Ed.2d 119 (1980).

[37] See Pre-Trial Order Stipulation 42 at p.39.

First District, Plaquemines Parish.[38] The federal examiners then listed a total of 26,978 persons as eligible to vote in those parishes;[39] of that number 25,138 (93.18 percent) were black. As of January 1, 1989, 15,432 persons remained on the voting rolls as federally listed voters, who are presumed not otherwise registered to vote.[40] At the time of Plaquemines' designation, only 96 black persons in the parish were registered to vote. However, by October 1967, federal examiners had listed 1,254 black persons in Plaquemines Parish, resulting in an increase in the number of black persons registered to vote in Plaquemines Parish from 96 to over 1,300.[41]

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[38] See 42 U.S.C. §1973d; Pre-Trial Order Stipulation 44, pp.39-40.

[39] See 42 U.S.C. §1973e(b); Pre-Trial Order Stipulation 44, pp.39-40.

[40] See 42 U.S.C. §1973e(a); Pre-Trial Order Stipulation 44, pp.39-40.

[41] See Pre-Trial Order Stipulation 45, p.40.

In sum, notwithstanding historic disenfranchisement, voter registration since 1965 has demonstrated generally increased participation by black voters, and today no state action or laws prevent black participation in the electoral process. In the summer of 1984, the most recent analysis of voter registration by race showed over seventy percent of both races are registered to vote and that the gap in between black and white voter registration continues to close. In fact, as previously indicated, black voter registration now exceeds white voter registration in Orleans Parish.

2. The History of the Redistricting Plan Here in Question

For the past 110 years, the First Supreme Court District has encompassed the greater metropolitan New Orleans area. The present districting plan for the Supreme Court, which includes the First Supreme Court District consisting of the parishes of Orleans, St. Bernard, Plaquemines and Jefferson, was first drafted in the 1879 Constitution for the State of Louisiana. Since that time, the voters in the First Supreme

Court District have elected two justices on the Supreme Court. In each of the Constitutions since then, 1898, 1913, 1921 and 1974, this districting plan has been readopted without objection. After the 1974 Constitution had been ratified, the United States of America, through the Justice Department, precleared the Constitution electing not to challenge the composition of the districts and the number of justices to be elected from each district. Cognizant of the factors identified in Overton v. City of Austin, 871 F.2d 529, 540 (5th Cir. 1989), this Court finds that the creation of the present First Supreme Court districting scheme was not devised for discriminatory purposes. The district was created because the parishes of Orleans, St. Bernard, Plaquemines and Jefferson were considered an inseparable metropolitan or quasi-metropolitan area.

Access to the political process is further confirmed by the history of the present districting plan, which is set forth in the 1974 Louisiana Constitution. The delegates to

Louisiana's 1973 Constitutional Convention were 132 in number. There were 105 elected delegates, all of whom were elected from their respective districts of the Louisiana House of Representatives. The remaining delegates, 27 in number, were appointed by the Governor to represent various facets of the Louisiana populace. Twelve of the delegates were black.[42] Each delegate to the convention, whether elected or appointed, had the right to select committee assignments.[43] None of the blacks chose to be on the Judiciary Committee; therefore, the Judiciary Committee for the 1973 Constitutional Convention consisted of eighteen delegates, all of whom were white.

The voting record of black delegates for the districting plan and its amendments shows the following:

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[42] A listing of the names, status as elected or appointed, and home districts of the black delegates appears in the Appendix to this Opinion, Table 4.

[43] See Records of the 1973 Louisiana Constitutional Convention, vol. 1, pp.6 and 35, Rule 51.

A proposed amendment to divide the state into seven Supreme Court Districts with a Justice elected from each district was defeated by a vote of 85-27, with a black delegate vote of one for the amendment, eleven against, and one absent.

A proposed amendment to divide the state into seven equally apportioned Supreme Court Districts with a Justice elected from each district was defeated by a vote of 67-47, with a black delegate vote of seven for the amendment, four against, and one absent.

Another amendment proposed that after January 1, 1975, the legislature divide the first district (Jefferson, Orleans, Plaquemines, and St. Bernard Parishes) into two districts with one Justice to be elected from each district. In support of this amendment, a white delegate argued:

> We have seven Supreme Court Justices, yet we have six supreme court districts, two being elected from one. If I follow the feeling of this constitutional right, we argued single member districts. Why should we make an exception here, why here? Why provide that district one is going

> to have two Justices and the rest of the districts are going to have one? Why not have seven districts?[44]

A black delegate elected from Legislative District 97 in Orleans Parish argued that the present arrangement of the Supreme Court Districts should not be changed.[45] This amendment was defeated by a vote of 63-50, with a black delegate vote of five for the amendment, and seven against.

The final districting plan, providing for six Supreme Court Districts, was adopted by a total vote of 103-9, with a black delegate vote of eight for the final plan, one against, and two absent.[46] The Constitution proposed by the 1973 Convention was approved by the federal Department of Justice[47] and ratified by the voters on April 20, 1974. The present districting may now be altered by a two-thirds vote

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[44] Id. vol. VI, p.720.

[45] Id. at 714-15.

[46] See Pre-Trial Order Stipulation 31, pp.37-38. The parties' stipulation does not account for the twelfth delegate.

[47] See 42 U.S.C. §1973c (1982). See also Chisom v. Edwards, 690 F.Supp. 1524, 1525 & n.4 (E.D.La. 1988).

of the elected members of each house of the legislature.[48] Although certain proposals are pending, no amendment is forthcoming as of this date.

3. Other Discrimination

In addition to data pertaining to franchisement, other stipulated data demonstrate the discrimination in education, housing, employment, and general access to political processes that has sadly figured prominently in Louisiana's history.[49] For example, Louisiana enforced a policy of racial segregation in public education prior to 1954, in transportation prior to 1964, and in accommodations prior to 1964, until these practices were outlawed by the United States Supreme Court and Congress.

Vestiges of such discrimination still exist, as in the State's system of higher public education; as recently as

[48] See Pre-Trial Order Stipulation 11, p.26 and note 15 supra.

[49] The Court will not detail here the parties' Stipulations in this regard, appearing in the Pre-Trial Order as Stipulations 36-45 at pp.38-40 and 93-99 at pp.53-54.

August 1988, a panel of three judges found Louisiana higher public education operated as a dual system.[50] A prime example of such vestiges of past discrimination can be found in the legal profession, an important point of access to the political process. Until 1947, no black persons were admitted to law school in Louisiana. At the present time, Louisiana operates two public law schools: Southern University attended by virtually all of the State's public black law student population and the academically superior LSU Law School, attended by most of the white public student population.[51] All the current officers of the Louisiana Bar Association are white, and no black judge has ever served as one of the officers of the Louisiana District Judges Association. The Court further accepts the testimony of Judge Revius O. Ortique that the New Orleans Bar

[50] See United States v. State of Louisiana, 692 F.Supp. 642 (E.D.La. 1988).

[51] In making these findings, the Court takes judicial notice of facts in the record of proceedings before the three judge Panel in United States v. State of Louisiana, Civil Action 80-3300.

Association has never endorsed a black candidate.

The relatively lower economic status of local black residents further affects accessibility to better education and such practicalities as campaign funding.[52] In this regard, both Judge Ortique and Judge Bernette Johnson testified that black candidates have considerable difficulty raising campaign funds and that generally, the better funded candidates win.

4. Recent Access to Political Candidacy

Black candidacy is a relatively recent phenomenon, and the parties' stipulations detail the extent to which blacks have been unsuccessful in their bids for judicial office and/or have not run for judicial office. The Court heard testimony from several unsuccessful black judicial candidates, including Civil District Court Section "H" Judge Revius Ortique, who testified regarding his unsuccessful bid for a seat on the Supreme Court in 1972; Melvin Zeno, Assistant District

[52] See Pre-Trial Order Stipulations 101-9, pp.54-55.

Attorney for Jefferson Parish and practicing attorney, who was unsuccessful in a bid for Division "L" of the 14th Judicial District Court in Jefferson Parish; and Anderson Council, who testified regarding his unsuccessful 1987 bid for Juvenile Court Judge in Jefferson Parish. The court also heard testimony from Edwin Lombard concerning his unsuccessful bid for the statewide office of Secretary of State in 1987.

Melvin Zeno testified that he maintained a low profile during his campaign in order to keep his race unknown. Mr. Zeno turned down personal appearances and excluded certain of his qualifications from his campaign materials for the purpose of obscuring his race. Additionally, Mr. Zeno's opponent was an area attorney who had been a state legislator for approximately five to seven years and had good name recognition in Jefferson Parish. Mr. Zeno also testified that he spent only half what his opponent spent in

campaigning for the judicial seat.[53]

Likewise, Anderson Council testified that he maintained low visibility during his campaign in an attempt to keep the white public from learning he was black. Mr. Council also testified that he spent only 5% of the total campaign moneys spent by all the candidates.[54]

In the 1987 statewide election for Secretary of State, Rudy Lombard had the same name recognition problem that Melvin Zeno encountered. Mr. Lombard ran opposite Fox McKeithen, a candidate with great name recognition due to the fact that his father was a former governor of the state. In the statewide election, Mr. Lombard did not advance to the runoff; however, the returns from the primary parishes in the First Supreme Court District show that Lombard was the leader. If the returns in the rest of the state had been like those in the First Supreme Court District, Mr. Lombard

[53] See Transcript p. 81.

[54] See Transcript p. 92.

would have made the runoff as the election front runner.[55]

In addition, the Court heard testimony from Civil District Court Section "I" Judge Bernette Johnson, who testified that she would not run for the Supreme Court notwithstanding her perceived qualifications because of her speculation that she would not win. Stipulated statistical data pertaining to election of judicial offices elected on a parish-wide basis in the First Supreme Court District shows that black persons currently serve as judges only in Orleans Parish.[56]

For example, only two black persons have ever run for a seat as Justice of the Louisiana Supreme Court in this century; no black person has been elected to the Louisiana Supreme Court in this century; and the only black person to serve on the Supreme Court in this century was attorney Jessie Stone, who was apppointed to a vacancy on the

[55] See Appendix to this opinion, Table 6.

[56] See Appendix Tables 1 and 3.

Louisiana Supreme Court for a period of 17 days, from November 2, 1979, through November 19, 1979. Nevertheless, the significance of black candidacy must be remarked, however recent its development.

The two black candidates ran in special elections for the two seats from the First Supreme Court District in 1972. Each chose to become a candidate for a different seat, but the evidence fails to demonstrate this candidacy or the outcome were dictated by racial factors. Judge Revius Ortique chose to run against three white candidates, including present Justice Pascal Calogero, one of the more "liberal" Justices, rather than to compete with Justice Marcus, one of the more "conservative" judges, because like Justice Calogero, Judge Ortique had no prior judicial experience at that time. Earl J. Amedee competed against four white candidates for the other position. However, in light of the candidates' failure to obtain the support of the black communities, discussed below, the court cannot find

that their candidacy was limited by vestiges of past segregation. Rather, their participation suggests increasing access to judicial candidacy.

It is true that since January 1978, a position in the First Supreme Court District has been filled by contested primary elections in 1980 and 1988, and there were no black candidates in either of the elections. Judge Ortique and Judge Johnson both testified they would not run again because they cannot win. The Court rejects this testimony as speculative, and lacking probative value; if black candidates do not run and increase their notoriety, they surely cannot win.

Notwithstanding Louisiana's history of discrimination, the recent careers of several of New Orleans' black politicians demonstrate the increased access minority members have had to local political processes, including the judiciary. While such success is usually due to large support by the black community, the white vote has contributed

significantly to the election of black candidates.

Such increased political access is demonstrated by the political career of former New Orleans Mayor Ernest Morial. He was the first black person to serve on the Louisiana Court of Appeal in this century, elected in 1972 in a contested election against a white candidate to a seat from District 1 of the 4th Circuit Court of Appeal (Orleans Parish). At the time of his election, Mr. Morial was a judge on the Orleans Parish Juvenile Court, a position to which he was appointed in 1970. He served on the court of appeal until 1977 when he resigned to become Mayor of the City of New Orleans.

No black person has served on the court of appeal in this century from an election district encompassing Jefferson, St. Bernard or Plaquemines Parish, but the recent history of the Orleans Parish Civil District Court presents a different picture:

Israel Augustine, a black lawyer, was unopposed in his 1981 election to an open seat on District 1 of the 4th Circuit Court of Appeal (Orleans Parish). At the time of his election, Mr. Augustine was serving as a member of the Criminal District Court of Orleans Parish. Joan Armstrong, a black lawyer, was unopposed in her 1984 election to an open seat on District 1 of the 4th Circuit Court of Appeal (Orleans Parish). At the time of her election, Ms. Armstrong was serving as a judge in the Juvenile Court of Orleans Parish, a position she served by appointment following Morial's resignation in 1972 to run for the 4th Circuit Court.

Judge Ortique was the first black person to serve on the Orleans Parish Civil District Court, having been recommended for appointment as ad hoc judge in Division B of the court by Justices Calogero and Marcus in 1978. Judge Ortique was serving as an ad hoc judge, when he defeated a white challenger for Division H of the court in

1979. He was unopposed for reelection in 1984.

In 1984, Judge Bernette Johnson became the first black candidate to defeat a white candidate in a contest for an open seat on the Orleans Parish Civil District Court. In 1986, Yada Magee, a black lawyer, defeated a white candidate in a contest for an open seat on the Orleans Parish Civil District Court.

The first black person to serve on the Orleans Parish Criminal District Court in this century was Israel Augustine who was appointed in 1969. As an incumbent, Judge Augustine defeated two white challengers in the 1970 Democratic primary election to become the unopposed Democratic nominee in the general election. He served on the Orleans Parish Criminal District Court until 1981 when he was elected to the court of appeal. No black person, other than Israel Augustine, has been elected to the Orleans Parish Criminal District Court in this century.

In 1984, Ernestine Gray became the first and only black

person in this century to defeat a white candidate in a contest for an open seat on the Orleans Parish Juvenile Court. In 1988, Dennis Dannel became the first and only black person in this century to defeat a white incumbent candidate in a contest for the Orleans Parish Traffic Court. No other black person has been elected as an Orleans Parish Traffic Court judge in this century.

In 1986, Bruce McConduit became the first and only black person in this century to defeat a white candidate in a contest for an open seat for the Orleans Parish Municipal Court. No other black person has been elected as a municipal court judge in Orleans Parish in this century.

In this century, no black person has served as a judge in St. Bernard of Plaquemines Parish, but since 1978, no black persons have been candidates for a judgeship in the parishes of St. Bernard and Palquemines. In this century, no black person has been elected to the First or Second City Court for New Orleans. Since 1978, no black candidate has

been elected in a contested election to parish-wide office in St. Bernard, Plaquemines and Jefferson.

The above facts show many areas of judicial office in which black candidates have not participated. However, this Court is not prepared to make a blanket finding of restricted access to candidacy, given recent significant strides in this area. Moreover, at least in so far as relates to the recent elections of Orleans Parish Criminal Court Judges and Orleans Traffic Court Judges, blacks have crossed race lines.

5. Other Thornburg Factors

The Court further notes that there is no suggestion or record evidence of racial overtones or appeals in judicial or other elections, nor of a lack of responsiveness on the part of judges or other elected officials to the particularized needs of the members of the minority group.

B. Analysis of Racial Block Voting and Cohesion

1. The Judiciary

Since 1976, candidates for judicial office do not run in

partisan elections. Instead, all candidates for all of the offices to be elected on a given date run in the open primary election. However, a candidate's political party enrollment is indicated on the ballot. There is a majority-vote requirement in elections for judicial office. If no candidate receives a majority of the vote in the primary, the top two vote-getters then compete in a general election. Parish-wide judicial offices are elected to a designated position.

a. Elections for Supreme Court Justices from the First District

Since January 1978, a position on the Supreme Court for the State of Louisiana has been filled by contested elections in 1980 and 1988. These contested positions were filled in the primary elections. There were no black candidates in either of the elections. However, weighted regression analysis suggests the following allocation of votes:[57]

[57] See Weber Report, Appendix B, pp. B-1, 2 and 3.

Year	Election	Winner	% of Black Voters for Winning Candidate	% of White Voters for Winning Candidate
1974	General	Calogero	98.3	71.0
1980	Primary	Marcus	77.5	69.7
1988	Primary	Calogero	59.9	64.7

Homogeneous Precinct Analyses show:

Year	Election	Winner	% of Black Voters for Winning Candidate	% of White Voters for Winning Candidate
1974	General	Calogero	96.4	71.0
1980	Primary	Marcus	75.3	69.3
1988	Primary	Calogero	59.3	64.9

Unweighted Regression Analyses suggest:

Year	Election	Winner	% of Black Voters for Winning Candidate	% of White Voters for Winning Candidate
1974	General	Calogero	98.6	71.7
1980	Primary	Marcus	77.9	71.2

1988	Primary	Calogero	60.7	65.7

Thus, the candidate supported by a majority of black voters was elected in each instance. Although no statistical evidence was presented concerning the racial voting patterns in the 1972 special election for the First Supreme Court District, a black candidate ran for both of the available seats. One candidate, Judge Ortique testified that there was a substantial number of blacks who crossed over and supported the white candidate.[58] Judge Ortique received 27,648 votes (14.0%) in the First Supreme Court District and 21,744 votes (20.7%) in Orleans Parish.[59] From the statistics that are available concerning the 1972 special election, it appears that there was a black crossover in the election for the second Supreme Court seat in the First District. In that

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[58] See Trial Transcript p. 30.

[59] For election results, see Appendix in this Opinion. Table 5. A majority of the black vote in Orleans would have to be 50% of 53.6%, or 26.8% of the black vote.

election, Mr. Amedee, the only black candidate, received only 11,872 votes (5.8%) in the First Supreme Court District and 8,997 votes (8.5%) in Orleans Parish, revealing that there was even a greater black crossover vote than in the Ortique/Calogero race.[60]

Based upon the foregoing, the Court finds there is no pattern of racial bloc voting in the four most recent elections for Supreme Court Justice from the First Supreme Court District.

b. Other Judicial Elections

Nor is there a usual pattern of defeat for the black minority's preferred candidates in the 75 other judicial elections within the four parishes of the First Supreme Court District between 1978 and the present.

Since January 1978, in the parishes that constitute the First District, there have been 51 instances in which one of the judicial positions have been filled by contested election.

[60] See Appendix in this Opinion, Table 5.

For these 51 contested judicial positions, 66 primary and general election contests have been held to fill the seats at issue. Black persons have participated as candidates against white persons for 21 of the contested judicial positions and in 30 of the primary and general elections conducted to fill those positions. The remaining 30 contested judicial positions and the 36 elections necessary to fill those positions involved white candidates only. Most importantly, however, the minority candidate of choice has been elected in 62.7% of the elections.[61]

Ecological regression analyses for 34 judicial elections (24 primaries and 10 general elections)[62] show that there is significant crossover voting among both white and black voters in judicial elections. A considerable number of black voters do not always support the black candidate, nor do the white voters always support the white candidate.

[61] See Appendix Table 2.

[62] See United States' Exhibit 16.

In addition, the Court heard testimony from Melvin Zeno who received significant endorsements from white Jefferson Parish officials and from primarily white political organizations in his bid for District Court Judge in Jefferson Parish during 1988.[63] The willingness of prominent white politicians to actively support black candidates demonstrates that crossover politics exists even in Jefferson Parish.

Lionel Collins was the first and only black person to serve as a judge in Jefferson Parish in this century. Judge Collins was appointed to a seat on the 24th Judicial District Court in 1978. As an incumbent, he was supported by prominent political factions and was unopposed for both his initial election to another seat in 1978 and for his reelection in 1984. Judge Collins died in April 1988 before completing his term in office.

There are two city courts in New Orleans for which judges are not elected on a parish-wide basis. All of the

[63] See Trial Transcript, pp. 67-68.

persons residing in Orleans Parish except for those persons who reside on the West Bank of the parish in the 15th Ward (Algiers) are eligible to vote for the three members of the First City Court for New Orleans. All persons residing on the West Bank of the parish in the 15th Ward (Algiers) are eligible to vote for one member of the Second City Court for New Orleans. Since 1978 there have been 4 instances in which a First City Court judgeship position has been filled by contested election, and 5 primary and general elections have been held to fill the 4 positions. Black persons have participated as candidates against white persons for 3 of the contested positions and in 4 of the elections held to fill those positions.

In 1988, black candidate Dennis Dannel achieved his victory for Orleans Parish Traffic Court Judge notwithstanding other black leaders' endorsements of Dannel's white opponent. For example, both former Mayor Ernest Morial and State Senator Bill Jefferson endorsed

white candidate Lambert Hassinger in his bid for reelection to Traffic Court against Dannel.[64]

2. Exogenous Elections

In the 1987 primary election for Secretary of State, there were two black candidates and seven white candidates.[65] Weighted ecological regression analysis for the 1987 primary election for Secretary of State indicates that in the four parishes that constitute the First District, over 80 percent of black voters and under 20 percent of white voters cast their votes for Edwin Lombard, a black candidate.

In the 1987 Secretary of State primary election, Edwin Lombard received 35 percent of the vote in the four parishes that comprise the First District, to finish as the plurality winner. He received a majority of the votes cast within Orleans Parish, but obtained only 20 percent of the votes cast in Jefferson, Plaquemines and St. Bernard Parishes.

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[64] See Times-Picayune 11/2/88, at B-3; 11/7/88, at B.2

[65] See Appendix Table 6.

Additional Findings

In First District elections, there is a majority-vote requirement and staggered terms; single-shot voting is not allowed.

Cross-over voting by voters of one race to support candidates of another race is occurring increasingly in Orleans Parish elections for non-judicial offices indicating a pattern of both white and black voters to look at factors other than the race of candidates in making election choices.

Cross-over voting by white voters to support black candidates for non-judicial offices in Orleans Parish occurs on a regular basis with the result that black candidates frequently win parish-wide offices such as mayor, councilman at-large, and school board posts.

Roll-off in Orleans Parish judicial elections by black voters is sometimes large enough to prevent black candidates from winning elections in which white candidates participate.

Moreover, black and white voters in Orleans Parish

participate at approximately equal rates in recent elections for major office (President, U.S. Senate, Governor, and Mayor).

Factual Conclusion

Based upon the totality of circumstances before the Court, the Court is unable to find, and the plaintiffs, for the reasons hereinabove stated have failed to prove by a preponderance of the evidence as a factual matter, that a bloc voting majority is usually able to defeat candidates supported by a politically cohesive geographically insular minority group.[66] The overall present reality in the Court's view is not a picture of racial polarization to the detriment of the minority plaintiffs isolated in Orleans Parish, but rather is an emerging political process in Metropolitan New Orleans, wherein the talents of black individuals as leaders in the judiciary and in other traditionally political offices have been recognized by black and white voters. A brief

[66] In reaching this conclusion, the Court has given great weight to the expert reports of Dr. Ronald E. Weber and Dr. Robert S. Miller.

glimpse at the statistical evidence serves to demonstrate that black individuals constitute a clear minority of elected officials, who have risen to positions of political prominence primarily in Orleans Parish only, where the greatest number of black individuals in the Metropolitan area reside. But the black community has been able to elect their candidates of choice in a significant number of elections.[67]

In reaching this conclusion, the Court has noted the opinion testimony of Dr. Engstrom to the effect that racially polarized voting exists. However, as will be detailed below in the Court's discussion of the applicable law, the overall focus of the Court's inquiry must be whether the minority candidate can elect its candidates of choice. As this Court previously stated:

> Whether Dr. Engstrom's analysis in this case comports with what even the plurality was approving in Thornburg is unclear.

[67] While the Court's conclusion applies to the entire four-parish area of the First District, the Court finds that its conclusion is even stronger vis-a-vis the plaintiff-class, black Orleans Parish voters.

> While Dr. Engstrom centered his analysis in this case on the race of the candidates, the plurality stated that "the race of the candidate per se is irrelevant to racial bloc voting analysis." Id. at 67, 106 S. Ct. at 2775. But cf. id. at 68, 106 S. Ct. at 2775-76 ("Because both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites.").

Thus, while election and support of black candidates is important in the totality of circumstances, it is not determinative of a finding of racial cohesion or racially polarized voting.

While blacks support black candidates to a large degree, and whites white candidates, the Court finds enough crossover voting exists to prevent a finding of significant racial polarization, and while the evidence demonstrates the relatively small number of black persons holding office, this finding does not trigger the additional more important

finding that blacks in the first district have been unable to elect the candidates of their choice. The political reality in South Louisiana is that the support of the black community is a very important factor in the success of any political candidate. It is rare that one may succeed without it.[68]

Conclusions of Law

This Court has subject matter jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1432 and 42 U.S.C. § 1973C.

There are two issues of law:

> 1. Whether the multimember district system in Louisiana's First Supreme Court District violates Section 2(a) of the Voting Rights Act; and
>
> 2. Whether the multimember district system in Louisiana's First Supreme Court District violates the Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

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[68] In addition to the facts recited heretofore, the Court in reading its conclusions herein has received and taken into consideration the 109 stipulations of fact set forth in paragraph 7 of the Pre-Trial Order of March 29, 1989.

The Court will address each issue in turn.

1. The Voting Rights Act

With respect to the first issue, the Fifth Circuit has previously determined in this litigation that section 2 generally applies to judicial elections.[69] However, the parties raise a threshold legal issue whether both subsections of section 2 apply to judicial elections or whether only subsection (a) is applicable. If only subsection (a) applies, defendants suggest only intentional acts of discrimination are prohibited. If both subsections apply, plaintiffs may prevail "by demonstrating that under a totality of the circumstances, a challenged election law or procedure has the effect of denying or abridging the right to vote on the basis of race."[70] In other words, under subsection (b), a "results test" may be used to evaluate the challenged election law or procedure.

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[69] Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), cert. denied, 109 S.Ct. 390 (1988).

[70] 839 F.2d at 1059.

Because of the Fifth Circuit's discussion (in its order of remand herein) of both subsections of section 2 and its reliance upon legislative history concerning subsection (b), it appears as a directive for this Court to apply both subsections of section 2 to this case.

However, defendants contend the resolution of this case is not governed by section 2(b) of the Act. Defendants assert that section 2(b) of the Voting Rights Act enshrines the "one man, one vote" principle as the touchstone test, which should not be used to analyze judicial elections, because the "one man, one vote" test was expressly rejected as applying to the judiciary in Wells v. Edwards, 347 F.Supp. 453 (M.D. La. 1972), aff'd 409 U.S. 1095, 93 S. Ct. 904, 34 L.Ed.2d 679 (1973).

The Wells litigation pre-dates the 1982 amendments to the Voting Act instituting the "results test." However, Wells has never been overruled and the law of the case is silent on Wells' viability.

If this Court's assumption as noted above is incorrect, and Wells applies as the governing standard, this Court would conclude without hesitation that plaintiffs have failed to prove discriminatory intent with respect to the scheme here at issue, and that therefore plaintiffs' Voting Rights Act claims must be dismissed. However, since the tenor of the Fifth Circuit's opinion in this case suggests otherwise, this Court is bound by that opinion as the law of the case.

Accordingly, this Court has evaluated the facts before it under the rules of Gingles and its progeny.[71] As stated by the Fifth Circuit:

> It has been widely recognized that "multimember district and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population." [Citing Gingles] Such schemes are not, however, per se violations of section 2. [citation omitted]

[71] See Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed. 2525 (1986) and cases cited in this Court's Opinion of July 28, 1988, Rec. Doc. no. 52, 690 F. Supp. 1524 (E.D. La. 1988).

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989). This Court must undertake "a searching practical evaluation of past and present reality," with a "functional view of the political process." Id. at 1204 (quoting Gingles).

Addressing the specific evidence necessary under section 2(b) to prove a section 2(a) violation, the Gingles plurality set forth three matters a minority group must prove: (1) that it is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) that it is politically cohesive; and (3) that the white majority votes sufficiently in a bloc to enable it to usually defeat the minority's preferred candidate because the minority's submergence in a white multi-member district impedes the minority's ability to elect its chosen representatives. See 478 U.S. at 50-51, 106 S. Ct. at 2766-67, 92 L.Ed.2d 46-47; Campos v. City of Baytown, 840 F.2d 1240, 1243 (5th Cir. 1988), cert. denied, 109 S. Ct.

3213 (1989).

Other relevant but not necessary focal factors[72] are enumerated in the Senate Judiciary Committee majority report in respect of section 2[73] and include: the state's history of voting discrimination; the extent of racially polarized voting; the state's use of such voting practices as unusually large election districts, majority vote requirements and anti-single shot procedures;[74] access to candidate slating processes; the extent to which limited education and employment opportunities and health benefits hinder minority participation; racial appeals in political campaigns and the extent to which minority members have been elected to public office; elected officials' responsiveness to minority needs; and the viability of voting qualifications.

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[72] Gingles, 106 S. Ct. at 2765-66.

[73] This report accompanied the bill amending section 2 of the Voting Rights Act in June 29, 1982. See S. Rep. No. 97-417, 97th Cong. 2d Sess. 28 (1982), USCCAN 1982, pp. 206-07, cited in Thornburg v. Gingles, supra, 106 S. Ct. at 2759-60.

[74] Bullet (single-shot) voting is denied in Gingles, 106 S. Ct. at 2760 n. 5.

In evaluating the statistics necessary for plaintiffs to prove racial bloc voting, this Court is bound by recent Fifth Circuit authority to consider statistical evidence from judicial elections and from exogenous elections.[75] However, in the instant case, there is no sparsity of data pertaining to judicial elections in which black candidates have run, and while the Court gives due consideration to data from exogenous elections, the Court concludes data from judicial elections should receive greater weight. Nevertheless, as previously indicated, the Court is of the opinion plaintiffs have failed to prove by a preponderance of the evidence, the existence of racial bloc voting as a matter of law.[76]

This conclusion is critical because multi-member districts and at large election schemes, are not per se violative of minority voters' rights.[77] Rather, plaintiffs must

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[75] See Westwego, 872 F.2d at 1206; Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987).

[76] To hold otherwise, the Court would be required to ignore the expert reports of Drs. Weber and Miller which the Court declines to do.

[77] Thornburg v. Gingles, supra, 106 S. Ct. at 2752.

prove that the use of a multi-member electoral structure operates to minimize or cancel out their ability to elect their preferred candidates. This, the plaintiffs have not done. As detailed in the Court's findings of fact, the statistical evidence regarding judicial and non-judicial elections shows that the blacks have had full access to the political process and routinely elect their preferred candidates, often times joining forces with a significant portion of the white electorate, and creating significant crossover voting.

Plaintiffs would have the Court create an amoeba-shaped, wholly-metropolitan district unique among the Supreme Court districts in the state for the sole purpose of guaranteeing a black justice. In concluding, the Court stresses that the plaintiffs' goal appears wholly contrary to the express proviso in section 2 that "nothing in this section establishes a right to have [blacks] elected in numbers equal to their proportion in population."

2. The Fourteenth and Fifteenth Amendments

With respect to the second issue, "multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State." White v. Regester, 412 U.S. 755, 93 S. Ct. 2332, 2339 (1973). Proof of racially discriminatory intent or purpose is required to show a violation under either the fourteenth or fifteenth amendment. Kirksey v. City of Jackson, Miss., 663 F.2d 659 (5th Cir. 1981). Washington v. Davis, 426 U.S. 229, 239-241, 96 S. Ct. 2040 (1976). Plaintiffs have failed to prove as a matter of law that the present system by which Louisiana Supreme Court Justices are elected was instituted with specific intent to dilute, minimize or cancel the voting strength of plaintiffs. It is clear that an invidious discriminatory purpose was not a factor at all in the legislative decision to provide a multi-member district for the Louisiana First Supreme Court District. Such being the

case, plaintiffs have failed to prove any constitutional violation from the operation of the present voting scheme.

For the foregoing reasons, the Clerk of Court is directed to enter judgment in favor of defendants dismissing plaintiff's claims.

New Orleans, Louisiana, this 13th day of September, 1989.

S/
UNITED STATES DISTRICT JUDGE

[The text of the opinion is followed by an appendix of 7 statistical tables; because of the difficulty in reproducing the tables and at the suggestion of the Clerk of the Court, fifteen copies of the tables have been lodged with the Clerk for the Court's use.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8014

LEAGUE OF UNITED LATIN AMERICAN CITIZENS COUNCIL NO. 4434,
Plaintiffs-Appellees,

and

JESSE OLIVER, ET AL.,
Intervening Plaintiffs-Appellees,

versus

WILLIAM P. CLEMENTS, ETC., ET AL.,
Defendants,

JIM MATTOX, ET AL.,
Defendants-Appellees,
Appellants,

versus

JUDGE F. HAROLD ENTZ, ETC.,
JUDGE SHAROLYN WOOD, ETC.
and GEORGE S. BAYOUD, JR., ETC.,
Defendants-Appellants,

and

TOM RICKHOFF, SUSAN D. REED, JOHN J. SPECIA, JR., SID L. HARLE, SHARON MACRAE and MICHAEL P. PEDAN, Bexar County, Texas State District Judges,
Appellants.

Appeal From the United States District Court
for the Western District of Texas

(September 28, 1990)

Before CLARK, Chief Judge,
GEE, POLITZ, KING, JOHNSON, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, DUHE, WIENER, AND BARKSDALE, Circuit Judges.* GEE, Circuit Judge:

Today we must decide whether Congress, by amending Section 2 of the Voting Rights Act in 1982 to add a "results" test for dilution of minority voting strength, meant to subject the selection of state judges to the same test as that for representative political offices by incorporating language from the Supreme Court decision in White v. Regester.[1] For reasons to be given -- and for the cardinal reason that judges need not be elected at all -- we conclude that it did not.

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*Judges Williams and Garwood took no part in the Court's deliberations or decision of this appeal. When this case was orally argued before and considered by the court, Judge Reavley was in regular active service. He participated in both the oral argument and the en banc conference.

In United States v. American-Foreign Steamship Co., 363 U.S. 685, 80 S.Ct. 1336, 4 L.Ed.2d 1491 (1960), the Supreme Court, interpreting 28 U.S.C. § 371(b), decided which senior judges are eligible to participate in an en banc court. Compare United States v. Cocke, 399 F.2d 433, 435 n.4 (5th Cir. 1968) (en banc). As Judge Reavley reads the American-Foreign Steamship Co. opinion, he considers himself ineligible now to participate in the decision of this case, and he has not therefore done so.

[1] 412 U.S. 755 (1973)

In summary, these are that Congress was at great pains to phrase the new Section 2 in such language as to make clear that its results test applies to voting in elections of representatives only; that as of the amendment's time judicial offices had never been viewed by any court as representative ones; that characterizing the functions of the judicial office as representative ones is factually false -- public opinion being irrelevant to the judge's role, and the judge's task being, as often as not, to disregard or even to defy that opinion, rather than to represent or carry it out; that, because of the highly intrusive nature of federal regulation of the means by which states select their own officials, legislation doing so should not be pushed beyond its clear language; and that, in view of these considerations, we should place such a construction on the 1982 enactment reluctantly and only if Congress has clearly mandated such a singular result.

We have carefully weighed the text and provenance of the statutory language against the opposing factors urged upon us as interpretive guides. Having done so, we conclude that the language of the 1982 amendment is clear and that it extends the Congressional non-Constitutional "results" test for vote dilution claims no further than the legislative and executive branches, leaving the underlying, Constitutional "intent" test in place as to all three. Especially telling, we conclude, is the circumstance that in borrowing language from the Court's White opinion Congress focused upon its reference to electing "legislators," broadening it so far, but only so far, as to electing "representatives," a term inclusive of elective members of the executive branch as well as of the legislature but not -- as, say, "state officials" would have been -- of members of the judiciary. That Congress did exactly as we have described is as undeniable as it is inexplicable on any basis other than that of a legislative purpose to include all elected

legislative and executive state officials but to exclude elected judges.

Finally, and bearing in mind the well-settled principle of statutory construction that the enacting Legislator is presumed to have been aware of the judicial construction of existing law,[2] we note that, as of the time of the addition of Section 2(b) and of the explicit results test to the Voting Rights Act, every federal court which had considered the question had concluded that state judges were not "representatives" and did not fall within the definition of that term. Had Congress, then, meant to exclude votes in judicial elections from the ambit of its new results test, it could scarcely have done so more plainly than by adopting the term "representative" to describe that ambit.

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[2] See, e.g., Shapiro v. United States, 335 U.S. 1, 16 (1948); United States v. PATCO, 653 F.2d 1134, 1138 (7th Cir.), cert. denied, 454 U.S. 1083 (1981).

Facts and Procedural History

The underlying facts of this appeal are carefully and correctly set out in the panel opinion, 902 F.2d 293 (5th Cir. 1990); we recapitulate them here no further than is necessary to an understanding of what we write today.

Plaintiffs attacked the Texas laws providing for countywide, at-large election of judges of the trial court of general jurisdiction, asserting that the imposition of a single-member system was necessary to prevent dilution of black and Hispanic voting strength. In a bench trial, the federal court rejected their constitutional arguments grounded in the Fourteenth and Fifteenth Amendments, finding a failure to prove the requisite discriminatory intent for relief under those provisions. The court determined, however, that the Texas law produced an unintended dilution of minority voting strength, a circumstance sufficient to call for relief under the Voting Rights Act, as amended in 1982 to incorporate a "results" test dispensing with the necessity of

proof of discriminatory intent. In consequence, and after pausing to allow for possible remedial action by the state, the court enjoined further use of the at-large system, confected and imposed a system of single-member elections, and directed that these be held last Spring.

On appeal, we stayed the court's order, expedited the appeal, held a panel hearing on April 30, and handed down an opinion on May 11. Four days later, pursuant to a majority vote of active judges, we ordered rehearing of the appeal en banc; and we now render our opinion.

Analysis

The Panel Opinion

At the time of its decision, our panel was constrained by an earlier decision of the Circuit holding that Section 2 of the Act applied to elections held to fill positions on the Louisiana Supreme Court, a seven-member body.[3] Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988). Constraint was

[3] It is the settled law of our Circuit that one panel of the Court does not overrule another. Ryals v. Estelle, 661 F.2d 904 (5th Cir. 1981).

superfluous, however; for the panel embraced and agreed with the holding and reasoning of Chisom applying the Act to judicial elections. It went on, however, to conclude that although in its view judges were indeed "representatives of the people," and although as their representatives the judges' elections were controlled by Section 2(b) of the Act, the elections of trial judges were not subject to voter-strength dilution concerns because their offices are single-member ones; and there is no such thing as a "share" of a single-member office. LULAC v. Clements, 902 F.2d 293, 305 (5th Cir. 1990). See Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986) (offices of mayor, council president, comptroller are single-member ones) and United States v. Dallas County, Ala., 850 F.2d 1433 (11th Cir. 1988) (county probate judge). A vigorous dissent by Judge Johnson, author of the panel opinion in Chisom, disputed the panel majority's characterization of judges from multi-judge districts as

holders of single-member offices. We need not resolve this disagreement within the panel, however, as we do not reach the issue.

Statutory Background

Originally enacted in 1965 as an anti-test, anti-device provision to relieve blacks of state-law strictures imposed upon their Fifteenth Amendment voting rights, Section 2 of the Voting Rights Act was construed by the Supreme Court in Mobile v. Bolden, 446 U.S. 55 (1980), as adding nothing to the Fourteenth and Fifteenth Amendment claims there made and as requiring, for its enforcement, proof of racially-discriminatory intent. At the time of Bolden, Section 2 read:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Congress reacted to Bolden by amending Section 2 to add to the statute a limited "results" test, to be applied and

administered "as provided in subsection (b) of this section."

As amended, Section 2 was cast in two subsections:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Earlier, in the course of deciding White, a 1973 voting rights case invoking constitutional grounds, the Court had described the required standard of proof in felicitous terms:

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 766 (emphasis added). Casting about for appropriate language in which to couch its new subsection, and having inserted the reference to results in old Section 2, Congress settled upon the italicized portion of Justice White's opinion quoted above, adopting it with only one significant alteration.

New subsection (b), then, is patterned on the White court's language and provides with great specificity how violations of the newly incorporated results test must be established: a violation is shown on a demonstration, by the totality of the circumstances, that state (or political

subdivision) nomination and election processes for representatives of the people's choice are not as open to minority voters as to others. The precise language of the section is significant; a violation is shown, it declares, if it is established that members of the protected classes

> have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[4]

Both the broad and general opportunity to participate in the political process and the specific one to elect representatives are thus treated in the new section.[5] As for the former, protecting it appears to involve all of the primal anti-test, anti-device concerns and prohibitions of original Section 2; and its provisions may well extend to all elections

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[4] As we note in text, the section goes on to specify that election success of class members is a circumstance to be considered and to disavow specifically any intent to mandate proportionate representation by race.

[5] Not all aspects of that process pertain to elections, e.g., the celebrated New England town meeting.

whatever, as did they.[6] These broader considerations center on the voter and on his freedom to engage fully and freely in the political process, untrammeled by such devices as literacy tests and poll-taxes. Where judges are selected by means of the ballot, these safeguards may apply as in any other election, a matter not presented for decision today. The second consideration -- opportunity to elect representatives of one's choice -- is also couched in the language borrowed from White v. Regester, 412 U.S. 755, 766 (1973); and, as we have noted, the Congress was at some pains to adapt and broaden the Court's phrases so as to convey its precise meaning. Before pursuing this aspect of our inquiry further, however, we turn aside to consider briefly the nature of the judicial office and two other closely

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[6] That scope is not at issue today, the trial court having found an absence of discriminatory intent; and we do not decide it. We point out, however, that there can be no doubt whatever that the provisions of the Fourteenth and Fifteenth Amendments, enforceable by means of Section 1983 actions, apply to judicial elections to forbid intentional discrimination in any aspect of them. City of Mobile v. Bolden, 446 U.S. 55 (1980); Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980).

related topics: judicial selection and the state of authority on judges' status as representatives.

The Judicial Office

Senators and members of the House of Representatives hold clearly political offices. Today, both are directly elected by the people; and it is their function as representatives to synthesize the opinions of their constituents and reflect them in the debate and deliberation of public issues.[7] The executive branch of the government, headed by our highest officer elected at large in the nation,

[7] James Madison, discussing the unique relationship of the representative to his constituents, for example, referred to a relationship of "intimate sympathy" between the elected and his electors, and argued that a legislator should fee an "immediate dependence" upon the will of his constituents. Frequent elections, according to Madison, are the only way to ensure this sort of relationship. Only by requiring legislators to return periodically to their constituents to seek their ongoing support and input, can the communication between the voters and their representatives that is essential to the maintenance of democratic government take place. Congress is a "popular" institution; it is, therefore inherently political.

Hickok, Judicial Selection: The Political Roots of Advice and Consent in Judicial Selection: Merit, Ideology, and Politics 4 (National Legal Center for the Public Interest 1990).

is also expected to bring the views and opinions which he offered the electorate in seeking the Presidency to bear on the job of running the federal machinery.

By contrast, the judiciary serves no representative function whatever: the judge represents no one.[8] As Professor Eugene Hickok has recently observed, in terms upon which we cannot improve:

> The judiciary occupies a unique position in our system of separation of powers, and that is why the job of a judge differs in a fundamental way from that of a legislator or executive. The purpose of the judiciary is not to reflect public opinion in its deliberations or to satisfy public opinion with its decisions. Rather, it is to ensure that the ordinary laws do not run contrary to the more fundamental law of the Constitution, to resolve disputes and controversies surrounding the law, and to resolve disputes among contesting parties over the meaning

[8] That this is the case is strongly implied in the Constitution, which provides for an appointive federal judiciary and was adopted by thirteen states, none of which had an elective one. Yet the Framers believed they were confecting a federal republic, and Article 4, Section 4, of the Constitution guarantees "to every State in this Union a Republican Form of Government. . . ." But if judges hold representative offices, or represent any constituency, appointing them is scarcely consistent with a republican system, defined by the Third Edition of Webster's Unabridged as "[A] government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives . . . ."

of the law and the Constitution. If a member of congress serves to make the law and a president to enforce it, the judge serves to understand it and interpret it. In this process, it is quite possible for a judge to render a decision which is directly at odds with the majority sentiment of the citizens at any particular time. A judge might find, for example, a very popular law to be unconstitutional. Indeed, it can be argued that the quality most needed in a judge is the ability to withstand the pressures of public opinion in order to ensure the primacy of the rule of law over the fluctuating politics of the hour.

Hickok, op. cit. supra n.7, at 5.

Thus the scholar, and with one voice the case authority of the time agreed. In 1982, as of the time of Congress's adoption of the Court's language from White, at least fifteen published opinions by federal courts -- opinions which we list in the margin -- had held or observed that the judicial office is not a representative one, most often in the context of deciding whether the one-man, one-vote rubric applied to judicial elections.[9] Not one had held the contrary.

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[9] Sagan v. Commonwealth of Pennsylvania, 542 F. Supp. 880 (W.D. Pa. 1982), appeal dismissed, 714 F.2d 124 (3rd Cir. 1983) (cross filing permitted by candidates for judicial office, prohibited for legislative and executive candidates)

Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist., 473 F. Supp. 334 (S.D. Ohio 1977)

The Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. D.C. 1975), cert. denied, 424 U.S. 933, 47 L.Ed.2d 341 (1976)

Fahey v. Darigan, 405 F. Supp. 1386 (D.C.R.I. 1975)

Gilday v. Board of Elections of Hamilton County, Ohio, 472 F.2d 214 (6th Cir. 1972)

Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095, 34 L.Ed.2d 679 (1973)

Buchanan v. Gilligan, 349 F. Supp. 569 (N.D. Ohio 1972)

Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd mem., 409 U.S. 807, 34 L.Ed.2d 68 (1972)

Sullivan v. Alabama State Bar, 295 F. Supp. 1216 (M.D. Ala.), aff'd per curiam, 394 U.S. 812, 22 L.Ed.2d 749 (1969) (involving Board of Commissioners of Alabama State Bar)

Irish v. Democratic-Farmer-Labor Party of Minnesota, 287 F. Supp. 794 (D.C. Minn.), aff'd, 399 F.2d 119 (8th Cir. 1968)

Buchanan v. Rhodes, 249 F. Supp. 860 (N.D. Ohio 1966), appeal dismissed, 385 U.S. 3, 17 L.Ed.2d 3 (1966), and vacated, 400 F.2d 882 (6th Cir. 1968), cert. denied, 393 U.S. 839, 21 L.Ed.2d 110 (1968)

N.Y. State Assn. of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967)

Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967)

Romiti v. Kerner, 256 F. Supp. 35 (N.D. Ill. 1966)

Stokes v. Fortson, 234 F. Supp. 575 (N.D. Ga. 1964)

Typical of these is the opinion in Wells v. Edwards, a decision by a three-judge district court from our own circuit which was affirmed on appeal by the Supreme Court.[10] There, after reviewing various authorities, the district court expressed the entire rationale of its view as follows:

> "Judges do not represent people, they serve people." Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary.
>
> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government."

Since 1982 a few courts have held that the use of the term "representatives" in Section 2 does not necessarily exclude judges. See Southern Christian Leadership Conference of Alabama v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989); Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988); Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987). (All recognizing that the "one-man, one-vote" principle does not apply to judicial elections and that, unlike legislators, judges do not "represent" those who elect them, but, nevertheless, refusing to apply its established meaning to Congress' use of the term "representatives" in Section 2 of the Voting Rights Act).

[10] 347 F. Supp. 453 (M.D. La. 1972), aff'd mem., 409 U.S. 1095 (1973) (Justice White, joined by Justices Douglas and Marshall, dissenting).

347 F. Supp., at 455-56 (quoting from Buchanan v. Rhodes, 249 F. Supp. 860 and New York State Association of Trial Lawyers v. Rockefeller, 267 F. Supp. 148). It is impossible, given the single point at issue and the simple reasoning stated, to believe that the majority of the Supreme Court, in affirming Wells, did not concur in that reasoning. If there were doubt, however, it would be laid to rest by the terms of the dissent, which attacks the district court opinion in stern, egalitarian terms for having, like other opinions cited by it, held "that the one-person, one-vote principle does not apply to the judiciary." 409 U.S. 1095, 1096 n.2. Nor is it likely, we think, that the Supreme Court would hold, as it necessarily did in affirming Wells v. Edwards, that although for purposes of the Equal Protection Clause of the Fourteenth Amendment judges "do not represent people," all the same, for purposes of Section 2(b) of the Voting Rights Act, judges are "representatives of [the people's]

choice." Both must be true, or neither one.[11]

Wells is not only instructive as to the meaning of "representatives" and thus as to the scope of Section 2, it is dispositive of the precise issue of the scope of Section 2's applicability raised in this case. The Wells holding -- that the one-person, one-vote rule does not apply to the judiciary -- leads inexorably to the conclusion that judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members. Absent the one-person, one-vote rule -- that the vote of each individual voter must be roughly equal in weight to the vote of every other individual voter, regardless

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[11] It is interesting to note that the dissent from the panel opinion, in the very course of complaining of the majority's refusal to apply Section 2 to trial judges, candidly recognizes that judges, unlike legislative and executive officers, "represent" no one:

> When weighing a state's claim that it has a compelling interest in retaining the existing at-large system, courts should keep in mind the common sense notion that the role of judges differs from that of legislative and executive officials. Since it is not the role of judges to "represent" their constituents an examination of the "responsiveness" of the elected official to minority concerns is clearly irrelevant.

902 F.2d at 317 n.17.

of race, religion, age, sex, or even the truly subjective and uniquely individual choice of where to reside -- there is no requirement that any individual's vote weigh equally with that of anyone else. This being so, and no such right existing, we can fashion no remedy to redress the nonexistent wrong complained of here.

The notion of individual vote dilution, first developed by the Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), was the foundation for the concept of minority vote dilution to be later elaborated in Whitcomb v. Chavis, 403 U.S. 124 (1971)[12], White v. Regester, supra, and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). Individual vote dilution was remedied by the Court through the concept of one-person, one-vote -- the guarantee of substantial equality among individual voters. With that guarantee in mind,

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[12] In Whitcomb v. Chavis the Supreme Court directly considered a racial dilution challenge and rejected the claim that the Indiana legislative reapportionment plan operated to minimize or cancel out minority voting strength. The Court held that the mere fact that ghetto residents were not proportionately represented did not prove a consitutional violation unless they were denied equal access to the political process.

remedial schemes to combat minority vote dilution were devised on a case by case basis.

Almost twenty years ago, we articulated the conceptual link between individual vote dilution and minority vote dilution, making clear the latter's dependence on the former:

> Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population.

Zimmer, 485 F.2d at 1303 (emphasis added).

For it is the assumption of substantial equality (achieved through the guarantee of one-person, one-vote) that underlies the concept of minority vote dilution. This assumption, the Court held in Wells, does not obtain in judicial elections; and without that assumption there exists no yardstick by which to measure either the "correct" magnitude of minority voting strength or the degree of minority vote dilution. Thus, on a conceptual level, and to paraphrase Justice

Harlan, we are asked to undertake the ineffable task of equalizing that which we cannot measure. Whitcomb, 403 U.S. at 169 (Harlan, J., separate opinion).

We are therefore unable to take the crucial step from individual vote dilution to minority vote dilution in this case, not only because the holding in Wells forbids us to assume the existence of "substantial equality," but because it compels us to recognize that no such equality need exist in the arena of judicial elections. The bridge between the two concepts, fashioned by the Court in Reynolds v. Sims and applied there to state legislatures, is of limited length and, as the Court made clear by affirming Wells v. Edwards, does not extend to the judiciary.

Finally, as the district court stated in Wells:

> The primary purpose of one-man, one-vote apportionment is to make sure that each official member of an elected body speaks for approximately the same number of constituents.

Wells, 347 F. Supp. at 455.

We reiterate that judges do not represent people and, thus, have no constituents. Judges speak the voice of the law. In doing so they speak for and to the entire community, never for segments of it and still less for particular individuals. To describe the judge's office merely as "not a representative one" is a gross understatement; in truth, it is rather the precise antithesis of such an office. Just insofar as a judge does represent anyone, he is not a judge but a partisan.

New Subsection 2(b)

So the land lay when Congress enacted Section 2(b) in 1982, choosing to replace the term "legislator" in the White phraseology with the term "representative" -- a term which is employed only at this spot and appears nowhere else in the entire Voting Rights Act. By the settled canon of construction, we must presume that Congress was aware of the uniform construction which had been placed by the courts on the term that it selected, a construction by which

the judicial office was not deemed a "representative" one. Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988); Sutton v. United States, 819 F.2d 1289 (5th Cir. 1987). Against this background, then, the Congress deliberately picked a term of art for use in amending Section 2 that up to that time had been universally held, and which it knew had been universally held by every federal court that had considered it as of that date, neither to include judges nor to comprise judicial offices. In view of these circumstances, we find it all but impossible to avoid the conclusion that Congress intended to apply its newly imposed results test to elections for representative, political offices but not to vote dilution claims in judicial contests, leaving the latter to be regulated and controlled by state law, by the Constitution, or by other provisions of the Voting Rights Act.[13] Given the

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[13] Indeed, as the panel opinion correctly notes, many states of the Union over the course of their history have maintained an appointive judiciary, and some do so today. 902 F.2d, at 296. Given the fact, also noted there, that none of the original thirteen states elected its judiciary, an appointive system must be viewed as consistent with the "Republican Form of Government" guaranteed the States by Article 4, Section 4, of the Constitution.

mutual exclusiveness of the two terms, to suggest that Congress chose "representatives" with the intent of including judges is roughly on a par with suggesting that the term night may, in a given circumstance, properly be read to include day.

We are further persuaded by the knowledge that in amending Section 2 Congress was well aware of the genesis of the concept of minority vote dilution. The legislative history makes clear that Congress knew that "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of Reynolds v. Sims." S. Rep. No. 417, 97th Cong., 2d Sess., reprinted in 1982 U.S. Code

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In view of this, and while it is certainly possible to imagine Congress's taking the position that, while states need not elect judges, if they do so they must do so on exactly the same terms as they elect representatives, the view which it adopted seems at least equally cogent: that since the office of the judge is not to represent the popular will, and since judges are not expected to initiate significant departures in law or policy, the states need not be subjected in their selection or election to so severe and intrusive a provision as one applying a "results" test to claims of minority vote dilution.

Cong. & Admin. News at 196. Given its awareness of the Wells v. Edwards holding -- that the one-person, one vote rule does not apply to the judiciary -- we must conclude that Congress, aware of the combined effect of Reynolds and Wells, limited the scope of amended Section 2 so as to rule out the judicial branch, an area within which the issue of the viability of minority vote dilution claims had been well settled.

Countervailing Arguments

Thus we find on one side of the argument whether Section 2(b)'s results test for elections applies to judicial ones the Congress's carefully chosen term of art -- "representatives" -- deliberately selected by Congress and placed in the section itself, with a settled legal meaning excluding judges. On the other side are ranged contentions of a more attenuated and derivative nature, which we now consider briefly.

First we are told that the definition of "voting," included in the original act as Section 14(c)(1) and now codified as 42 U.S.C. 1973(1)(c)(1), refers to "candidates for public or party office" and that, since judicial hopefuls are included within the generality of such a reference to candidates, the results test which applies to all others must be applied to them as well. The specific controls the general here, however, as in any other instance of statutory construction; and we see little force in the claim that an inference from a general term buried in a definitional section far from Section 2 should control the specific and supervening language inserted by Congress in the section itself. Nor is there any necessary conflict between the two provisions: as we have noted, it is only the application of the results test portion of amended Section 2 to vote dilution claims in judicial elections that is at issue today. Other portions of the section may well apply to such elections, as may the results test to claims other than those of vote

dilution, along with the indubitably applicable Constitutional prohibitions against any intentional act of discrimination in any electoral aspect.

The same answer also refutes the next argument: that because, as was held in Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), aff'd mem., 477 U.S. 901 (1986), Section 5 of the Act applies to state judicial elections, Section 2 must apply as well. As we have explained, portions of Section 2 may well apply -- except for the results test introduced in response to the holding in Bolden to govern vote dilution in the election of "representatives," which by its own terms does not.

Next we are told, in yet another general argument similar to those we have just rejected, that we must apply the dilution results test to judicial elections because the 1982 amendments to Section 2 were intended to expand, rather than to restrict, the section's coverage. Doubtless they were generally so intended; doubtless they did so; but the

presence of a general intent to expand coverage requires neither an expansion at all points nor the maximum imaginable expansion at any and is not even necessarily at odds with a specific intent to restrict coverage at one or another of them. Section 2 was greatly expanded, expanded to add a results test to the intent test of the Fourteenth and Fifteenth Amendments -- expanded in most respects, but not in all.

Finally, in a scatter of birdshot contentions, counsel point to the broad construction that the Attorney General has historically accorded the Voting Rights Act, to the absence in the Act's legislative history of any explicit statement that judicial elections are not covered, to the presence in that history of references to statistics on minority performance in various elections (including judicial ones), and to a single reference to "judicial districts" in a cautionary parade of horribles to be found in a subcommittee report hostile to the proposed 1982 amendments. None of these seems to us to

weigh very heavily in the scales against the specific terminology of Section 2 itself.[14] In the words of Justice Frankfurter, writing for a unanimous court in Greenwood v. United States, it appears to us that "this is a care for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." 350 U.S. 366, 374 (1955).

It is, and we do so.

Conclusion

In no area should federal courts tread more cautiously than where it is contended that Congress has imposed

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[14] Thus, as Justice Scalia has very recently suggested, we "appl[y] to the text of the statute the standard tools of legal reasoning, instead of scouring the legislative history for some scrap that is on point . . . ." Begier v. United States, ___ U.S. ____, ____; 110 L.Ed.2d 46, 63 (1990) (concurrence in judgment).

And these small matters are indeed scourings. The panel opinion avers, 902 F.2d at 299, and we do not doubt, that the reference to "judicial districts" is the sole reference to the judiciary in all the legislative history of the 1982 amendments of the Act. It will be noted that even this reference is one to judicial districts, not to judicial candidates; and in our Circuit many officials such as sheriffs, highway commissioners, district attorneys and clerks of court, who are "representatives" and not judges, are elected from judicial districts, e.g., Miss. Code Ann. (1972) 65-1-3.

incremental Federal power on the States; and the nearer to the core of traditional state authority and concern we are asked to venture, the more warily we should tread. The point is elegantly made by the panel opinion in this very case:

> Few would quarrel with the assertion that Section 2(b) as interpreted has worked a fundamental change in the Act, highly intrusive to the states. We have insisted in other contexts that Congress clearly state its intent to supplant traditional state prerogatives. Judicial insistence upon clear statement is an important interpretative tool vindicating concern for separation of powers and federalism. See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900 (1984) (Pennhurst II). This insistence upon an "unequivocal expression of congressional intent," Pennhurst II, 465 U.S. at 99, 104 S.Ct. at 907, is based upon the fundamental nature of the interests at stake. "The 'constitutionally mandated balance of power' between the states and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" Atascadero, 105 S.Ct. at 3147 (quoting Garcia v. San Antonio Metropolitan Transport Authority, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028 (1985) (Powell, J., dissenting)).

LULAC, 902 F.2d at 301.

It is hard to envision any area lying closer to the core of state concerns than the process by which it selects its own officers and functionaries. Any federal trenching here strikes at federalism's jugular; and such a radical federal trenching as is contended for today should therefore demand a very clear statement indeed. Instead, as regards the issue in this case, our investigation reveals an all but total absence of relevant legislative history and a statutory text that unambiguously excludes elections of non-representative state officers from Section 2's highly intrusive results test. If this was not the intended effect of Congress's substitution of representatives for legislators in Justice White's language, no other suggests itself; and we must reject any notion that Congress went to all the trouble of selecting that language and carefully modifying it, just so far and no further, randomly and with nothing particular in mind.[16][sic] It is

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[16] Both the dissent and, more obliquely, the special concurrence take our writing to task as resting on the narrow foundation of one word. In main, this is true; for the substitution of the term "representative" is all but the sole clue to be found -- in either the statutory text or the

never proper for us to extend a statute's force by construction into areas where Congress has not seen fit or has been unable to agree to go, and never less proper than in such supremely sensitive territory as this.

Judicial offices and judicial selection processes are sui generis in our nation's political system; they determine the referees in our majoritarian political game. These offices are not "representative" ones, and their occupants are not representatives. Indeed, the state processes for filling them need not even be elective, as those for all representative offices presumably must be. See U.S. Const., Art. 4, Sec. 4. In 1982, when Congress determined to expand Section 2 of the Act to incorporate a results test for vote dilution, it

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legislative history -- to guide the interpreter in unraveling the legislative intent behind this enigmatic statute. Dim or no, it is the only light available to guide our footsteps, and we have followed it as best we could.

By contrast, our specially concurring and dissenting brethren proceed by ignoring the sole guide available, first declaring that the only light that shines is of no help, then proceeding in total darkness and, so proceeding, to declare that the statute means, not what it says, but what they think Congress should have said -- pausing briefly in passing to accuse our majority of doing what they in fact have done themselves.

stopped short of imposing such a test for judicial offices on the States by limiting it to their election of "representatives." Should Congress seek to install such a test for judicial elections, it must say so plainly. Instead, it has thus far plainly said the contrary. Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988) is overruled.

REVERSED.

[The opinions of Chief Judge Clark and Judge Higginbotham concurring in the result and the dissenting opinion of Judge Johnson have been omitted from this Appendix; they can be found at 914 F.2d 620.]